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In the Supreme Court of the United States

OCTOBER TERM, 1985

DRAVO BASIC MATERIALS COMPANY, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in determining that the Corps of Engineers erred in declining to prepare an environmental impact statement before granting permits for dredging in navigable waters.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 758 F.2d 1081. The opinion of the district court (Pet. App. A16-A39) is reported at 596 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1985, and rehearing was denied on June 5, 1985 (Pet. App. A13-A14). On September 3, 1985, Justice White extended the time in which to file a petition for a writ of certiorari to and including October 3, 1985 (Pet. App. A15), and the petition was filed on October 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires all federal agencies to develop procedures, in consultation with the Council on Environmental Quality (CEQ), to insure that environmental considerations are given appropriate consideration in agency decision making (42 U.S.C. 4332(B)), and that an Environmental Impact Statement (EIS) is included in every recommendation or report on "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(C)).

Procedures developed by the CEQ to implement these mandates divide agency action into three basic types: for minor actions that, as a class, are environmentally inconsequential, an agency may categorically exclude any NEPA review (40 C.F.R. 1501.4(a)(2)); for other actions that are indisputably major in nature and have the potential for a significant effect upon the human environment, a full-blown EIS is required (40 C.F.R. 1501.4(a)(1)); but for a large number of agency actions falling between these two extremes, the agency must prepare an Environmental Assessment (EA) in order to determine whether an EIS is necessary. 40 C.F.R. 1501.4(b). If the EA indicates that there is no significant environmental impact attributable to the proposal, the agency prepares a Finding Of No Significant Impact (FONSI).

2. a. This case concerns permits issued by the Corps of Engineers to private parties under Section 404 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1344, and Section 10 of the Act. of Mar. 3, 1899 (Rivers and Harbors Act of 1899), 33 U.S.C. 403, permitting the dredging of shells in two areas of water in southern Louisiana, a "Gulf Coast Area," consisting of several bays in the Gulf of Mexico (Atchafalaya, East and West Cote Blanche, Four League and Vermillion), and a "Lakes Area," consisting of Lakes Pontchartrain and Maurepas. These areas had been dredged prior to the

issuance of the permits at issue here, which simply extended pre-existing Corps of Engineers permits. Before issuing the new permits, the Corps of Engineers prepared an EA which concluded that the permits as proposed (*i.e.* with the inclusion of certain mandatory protective conditions) would not have a significant effect on the quality of the human environment. The Corps therefore prepared a FONSI, rather than an EIS.

b. In the Gulf Coast area, the dredges collect oyster shells deposited in reefs ranging from one foot to eight feet in thickness that lie under four to eight feet of silty clay sediment. The dredges cut the mud and sediment and break up the underlying cementlike shell deposits. All this material is sucked up into the boat over a series of sizing screens and rotary washers. Material over 1/8 of an inch in diameter is saved; the rest is directed back into the water, where most of it settles. Two or three dredges are typically operating in these areas at all times. Respondents argued below that this dredging would create water quality problems; would affect fishing and the marine habitat, and might increase storm damage to the coastline. They also argued that the Atchafalaya Bay Delta, an ecologically active and unique area of emerging land, would be significantly harmed by the dredging (Pet. App. A27-A30).

The clam shells dredged in the Lakes Area do not occur in reefs. There, a rotary cutter is used to cut through the shell-bearing bottom sediment and the material is sucked on board the dredge and sized. The sediment is diluted with wash water and discharged from the rear of the dredge. Respondents claimed below that this discharge would cover plants and animals living on and in the lake bottoms and that the dredging would significantly increase turbidity and decrease water quality (Pet. App. A30-A33).

3. The State of Louisiana and five private environmental groups filed this case on December 20, 1983, against

responsible officials in the Corps of Engineers and the Army. Later, the companies performing the shell-dredging, petitioners in this Court, intervened as defendants. Pet. App. A2.

On September 18, 1984, the district court granted summary judgment to the federal defendants and petitioners. It stated, in agreement with all the parties, that if no conditions were imposed, the dredging would have a significant effect on the quality of the human environment. The court, however, determined that it was proper for the agency's environmental assessment to be based on the understanding that specific mandatory conditions would be included in the permits that would diminish the environmental harm. On that basis, it found that the Corps acted reasonably in not preparing an EIS (Pet. App. A34-A39).

The court of appeals reversed (Pet. App. A1-A12). First, it agreed with the district court that mitigation measures in a permit may bring the environmental effects of that permit below the level of significance, so long as those measures are concrete and mandatory. It was accordingly proper for the Corps and the district court to consider the permit restrictions in determining whether an EIS was required (Pet. App. A4-A5).

But the appellate court found that the district court had applied the wrong standard of review in evaluating the Corps' decision not to prepare an EIS. The court of appeals characterized the district court's approach as follows (Pet. App. A7 (citation omitted; brackets and emphasis in original)):

> In the case before us, the district court correctly required the plaintiffs to demonstrate the necessity of an impact statement. However, the district court also stated that an impact statement was to be required "if the [environmental assessment] reveals that the quality of human environment *would be* significantly degraded by the proposed action . . . ." 596 F. Supp. at 651 * * * . This language indicates that the

> district judge subjected plaintiffs to an improper evidentiary burden. The court appears to have required plaintiffs to prove a significant degradation of the environment actually would result before the Corps' conclusion could be deemed unreasonable. Such a standard would be unrealistic. Plaintiffs would have to prove an absolute without the benefit of the factual basis Congress intended to provide by an impact statement.

The court of appeals concluded that the plaintiffs need show only that the environment *may* be significantly degraded by the major federal action in order to require the preparation of an EIS (Pet. App. A7). The court of appeals directed the district court on remand to "review the evidence carefully to ensure that the Corps was reasonable in concluding that there is no possibility that the dredging *may* cause a significant degradation of some environmental factors" (Pet. App. A9 (emphasis in the original)).

ARGUMENT

Petitioners ask this Court to resolve an apparent conflict in the circuits over the appropriate standard for judicial review of an agency decision not to prepare an EIS. The court below tested the agency decision by a "reasonableness" standard, rather than applying the Administrative Procedure Act (APA) "arbitrary and capricious" standard (see 5 U.S.C. 706).

1. We have several times informed this Court of our view that there is basically only a semantic distinction between those two standards, most recently in *Gee* v. *Boyd*, cert. denied, No. 84-1062 (Apr. 22, 1985). That case, like this one, involved a decision by the Corps of Engineers to prepare a FONSI rather than an EIS before issuing a permit for dredging in navigable waters. In our opposition to the petition in that case, we explained that there appeared

to be no practical difference in outcome resulting from application of the "reasonableness" test—rather than the "arbitrary and capricious" test—to review an agency decision not to prepare an EIS. We noted that the circuits are sharply divided on the semantic issue, but observed that several courts of appeals have questioned whether there is any functional difference between the two tests.[1]

An agency may dispense with the preparation of an EIS for a major federal action if it determines that the proposed action will have no significant effect on the quality of the human environment. See the CEQ Regulations, 40 C.F.R. 1508.13; *Sierra Club* v. *Marsh,* 769 F.2d 868, 876 (1st Cir. 1985); *Friends of Engangered Species, Inc.* v.

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[1] Five circuits test an agency's determination not to prepare an EIS under the traditional arbitrary and capricious standard for review of agency action. *Grazing Fields Farm* v. *Goldschmidt,* 626 F.2d 1068, 1072 (1st Cir. 1980); *Hanly* v. *Kleindienst,* 471 F.2d 823, 828-829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); *Webb* v. *Gorsuch,* 699 F.2d 157, 159 (4th Cir. 1983); *Nucleus of Chicago Homeowners Ass'n* v. *Lynn,* 524 F.2d 225, 229 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *Sierra Club* v. *Peterson,* 717 F.2d 1409, 1413 (D.C. Cir. 1983).

Four other circuits have enunciated a "reasonableness" standard of review. *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463, 466 (5th Cir. 1973); *Winnebago Tribe* v. *Ray,* 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture,* 681 F.2d 1172, 1178 (9th Cir. 1982); *Wyoming Outdoor Coordinating Council* v. *Butz,* 484 F.2d 1244, 1249 (10th Cir. 1973). The Eleventh Circuit presumably falls within this grouping as well, by virtue of *Bonner* v. *City of Prichard,* 661 F.2d 1206 (1981) (en banc) (adopting as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981).

The Third Circuit has applied the reasonableness test in one case, but withheld judgment on whether that standard would be proper in all cases. *Town of Lower Alloways Creek* v. *Public Service Electric & Gas Co.,* 687 F.2d 732 (1982). The Sixth Circuit has declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.,* 659 F.2d 74, 75-76 (1981).

Jantzen, 760 F.2d 976, 986 (9th Cir. 1985). Although that principle is clear, the determination of significance will often require the exercise of discretion (see *City of New York* v. *United States Dep't of Transportation*, 715 F.2d 732 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984)), including a judgment as to possible uncertainties.[2] Accordingly, both the "reasonableness" standard and the "arbitrary and capricious" standard grant a measure of deference to an agency's exercise of that discretion in making the determination of no significant environmental impact. See *River Road Alliance, Inc.* v. *Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985), petitions for cert. pending, Nos. 85-785 & 85-800 ("There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted * * *.").[3] Thus, in its opinion in this case, the Fifth Circuit stated that if the agency's decision is "reasonable," made "objectively" and "in good faith on a reviewable environmental record," it " 'must be upheld.' " Pet. App. A5, quoting *Save Our Wetlands* v. *Sands*, 711 F.2d 634, 644 (5th Cir. 1983).

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[2] See Judge Friendly's dissent in *Hanly* v. *Kleindienst*, 471 F.2d 823, 837 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973), noting a "spectrum" of interpretations for the word "significance" as used in NEPA.

[3] We nevertheless see no justification for departing from the traditional APA standard for review of a FONSI, which is, in the NEPA context, the final agency action. See *National Helium Corp.* v. *Morton*, 486 F.2d 995, 1001-1002 & n.5 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974) (distinguishing between "arbitrary and capricious" review for decision not to prepare EIS and "reasonableness" review for factual sufficiency of EIS). Although this Court has not addressed the issue directly, it has assumed that the arbitrary and capricious standard applies. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976), the Court held that an agency's decision not to prepare a "regional" EIS in the absence of a proposal for "regional" action should be upheld "[a]bsent a showing of arbitrary action."

2. We are nevertheless concerned, quite apart from the court's re-assertion of its use of the "reasonableness" standard of review, that the opinion below may presage a departure from the degree of deference previously afforded and may lead to serious restrictions on an agency's discretion to determine that an EIS is not required.

In our opposition in *Gee* v. *Boyd*, *supra*, we noted (at 7) that in the circuits adopting the "reasonableness" test, a plaintiff had to make a rather strong showing of the likelihood of an effect on the environment to prevail on its suit. See, *e.g.*, *Sierra Club* v. *Marsh*, 769 F.2d at 870 (requiring a "substantial possibility" that the action will significantly affect the quality of the human environment). In the instant case, however, the Fifth Circuit has now required the plaintiffs to establish "only that the Corps was unreasonable in concluding there was *no* reasonable possibility that the proposed action would significantly degrade any environmental factor." Pet. App. A8 (emphasis added). This standard was recently reaffirmed in *Fritiofson* v. *Alexander*, 772 F.2d 1225, 1238 n.7 (5th Cir. 1985). If the Fifth Circuit means by this language to require only an abstract showing of a theoretical possibility of harm to the environment, it has unduly diminished the deference to be accorded to the agency determination. For example, the Fifth Circuit's language might preclude deference to a soundly based scientific determination of an agency in a case in which the plaintiffs merely produce some individuals who hold contrary beliefs. Cf. *City of New York* v. *United States Dep't of Transportation*, 715 F.2d at 738.[4]

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[4] A court applying the "arbitrary and capricious" standard of review could similarly restrict the agency's exercise of discretion by concluding that failure to give weight to such views was arbitrary. Thus, our objection to the decision below relates to the suggestion that an agency's evaluation of the likelihood of environmental harm is not to be accorded deference, rather than to its adherence to any particular phraseology to describe the standard of review.

3. Despite these concerns about the decision below, the United States has nevertheless concluded, in light of the uncertainty concerning the current position of the Fifth Circuit and the interlocutory posture of this case, that the issue is not now ripe for review by this Court.[5] If, however, the Fifth Circuit does fail to give due deference to agency FONSI's, that failure could well result in a major burden for federal agencies as they attempt to comply with NEPA, and review by this Court would them become appropriate.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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[5] The court of appeals has simply remanded the case to the district court for reconsideration, under the newly formulated standard, of the agency's decision not to prepare an EIS. If the district court again concludes that no EIS was required, and the court of appeals affirms, the issue will be moot. Otherwise, further litigation of this issue in the courts below will probably clarify the extent to which the Fifth Circuit is applying a more stringent standard to the review of agency actions in this context, thereby facilitating this Court's decision concerning the need for further review.

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